



## **ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

### **1 CFR Part 304**

#### **Revisions to Freedom of Information Act Regulations**

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Direct final rule.

**SUMMARY:** The Administrative Conference of the United States (“ACUS” or “the Conference”) is revising its regulations for disclosure of records under the Freedom of Information Act (FOIA) to comply with the FOIA Improvement Act of 2016.

**DATES:** This rule is effective on March 14, 2017, without further action, unless significant adverse comment is received by February 22, 2017. If significant adverse comment is received, the Conference will publish a timely withdrawal of the rule together with a modified final rule in the **Federal Register**.

**ADDRESSES:** Submit comments either by email addressed to [smcgibbon@acus.gov](mailto:smcgibbon@acus.gov) or by mail addressed to FOIA Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Shawne C. McGibbon, General Counsel, at 202-480-2088 or [smcgibbon@acus.gov](mailto:smcgibbon@acus.gov).

**SUPPLEMENTARY INFORMATION:** The FOIA Improvement Act of 2016<sup>1</sup>, was signed into law by the President on June 30, 2016. The Act consists of several amendments to the FOIA affecting FOIA administration. The Act requires each agency to review and update its FOIA

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<sup>1</sup> Pub. L. No. 114-185, 130 Stat. 538.

regulations in accordance with the Act's provisions. The Conference is making changes to its regulations accordingly, including: Correcting citations; highlighting the electronic availability of records; implementing the "rule of three" for frequently requested records; notifying requesters of their right to seek assistance from the agency's FOIA Public Liaison and the National Archives and Records Administration's Office of Government Information Services (OGIS); changing the time limit for appeals; implementing the foreseeable harm standard; and describing limitations on assessing search fees if the response time is delayed. The revisions also include some wording changes to the existing regulations for greater clarity.

### **Regulatory Procedures**

#### *a. Administrative Procedure Act (APA).*

Pursuant to 5 U.S.C. 553(b), we find that good cause exists for waiving publication of a general notice of proposed rulemaking and provision of a public comment period prior to issuance of the final rule. The amendments to the Conference's FOIA regulations contained herein are technical in nature. They concern matters of agency organization, procedure, and practice. They are being adopted in accordance with the mandated provisions of the FOIA Improvement Act of 2016, do not reflect agency discretion, and provide additional protection to the public. We note further that when the Conference adopted the FOIA regulations now being amended, we received a single set of comments from one person, which suggested various technical amendments, most of which were accepted and incorporated into the final rule. We conclude that a pre-issuance public comment period is unnecessary and not in the public interest. By issuing the current set of amendments as a direct final rule, we are nevertheless offering the public an opportunity to submit comments; but in the absence of any significant adverse comment received within 30 days of publication, the direct final rule will automatically go into

effect 50 days after its publication without further notice. If we receive timely significant adverse comment, we will consider modifying this rule, with appropriate public notice.

*b. Paperwork Reduction Act.*

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, does not apply because these regulations do not contain any new information collection requirements.

*c. Regulatory Flexibility Act.*

Because notice and comment procedures are not required for the current amendments to the Conference's FOIA regulations, as explained above, the regulatory flexibility analyses otherwise required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, do not apply to this rulemaking action. Nevertheless, the head of this agency certifies that this rulemaking action will not have a significant economic impact on a substantial number of small entities because it primarily affects individuals requesting records under the FOIA.

*d. Unfunded Mandates Reform Act.*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), these regulations will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation).

*e. Executive Order 12866.*

In issuing these regulations, ACUS has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in Section 1 of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735. These regulations have not been reviewed by the Office of Management and Budget under the Executive Order since they are not a significant regulatory action within the meaning of the Executive Order.

## **List of Subjects in 1 CFR part 304**

Administrative practice and procedure, Freedom of information.

For the reasons stated in the preamble, under the authority at 5 U.S.C. 552, 591-96 and Pub. L. No. 114-185, 130 Stat. 538, the Administrative Conference of the United States amends 1 CFR part 304 as follows:

### **PART 304 — DISCLOSURE OF RECORDS OR INFORMATION**

1. The authority citation for part 304 continues to read as follows:

**Authority:** 5 U.S.C. 552, 591-96.

#### **Subpart A — Procedures for Disclosure of Records Under the Freedom of Information Act**

2. Revise § 304.1 to read as follows:

##### **§ 304.1 General provisions.**

(a) This subpart contains the rules that the Administrative Conference of the United States (“ACUS” or “the agency”) follows in processing requests for disclosure of records under the Freedom of Information Act (“FOIA” or “the Act”), 5 U.S.C. 552, as amended, and in meeting its responsibilities under the Act. Note that electronic records are treated as records for the purposes of the FOIA. These rules should be read together with the text of the FOIA itself and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). They also may be read in conjunction with the agency’s “Freedom of Information Act Reference Guide,” which provides basic information about use of the Act in relation to the agency’s records. Requests made by individuals for

records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the agency's Privacy Act regulations as well as under this subpart.

(b) The agency will withhold records or information only when it reasonably foresees that disclosure would harm an interest protected by an exemption of the FOIA or when disclosure is prohibited by law. Where full disclosure is not possible, the agency will consider whether partial disclosure is possible and, if so, will take reasonable steps to segregate and release nonexempt information. These policies do not create any right enforceable in court.

(c) The agency has designated its General Counsel as its Chief FOIA Officer, who has agency-wide responsibility for efficient and appropriate compliance with the FOIA and these implementing regulations. The Chief FOIA Officer has designated the agency's FOIA Public Liaison, who can assist individuals in locating and obtaining particular agency records. Contact information for the Chief FOIA Officer and the FOIA Public Liaison are clearly indicated on the agency's website at <https://www.acus.gov/foia>.

3. Revise § 304.2 to read as follows:

**§ 304.2 Proactive disclosures.**

(a) Records that the FOIA requires ACUS to make regularly available for public inspection in an electronic format, including any records that have been requested three or more times, or were previously released and are likely to become the subject of subsequent requests or appear to be of general interest, may be accessed through the agency's website at <https://www.acus.gov>. A subject matter index of such records (or comparable tool) may also be accessed through the agency's website and will be updated on an ongoing basis.

(b) Information routinely provided to the public as part of a regular agency activity, including information posted on the agency's website (for example, press releases or recommendations adopted by the Conference pursuant to the Administrative Conference Act, 5 U.S.C. 591 *et seq.*), may be provided to the public without following this subpart.

(c) Any requester needing assistance in locating proactively disclosed or other agency records may contact the agency's FOIA Public Liaison at (202) 480-2080.

4. Revise § 304.3 to read as follows:

**§ 304.3 Requirements for making requests.**

(a) *How made and addressed.* You may make a request for records by using the FOIA Request form on the ACUS website at <https://www.acus.gov/foia>. You may also send a written request letter to the agency either by mail addressed to FOIA Public Liaison, Administrative Conference of the United States, 1120 20th Street, NW., Suite 706 South, Washington, D.C. 20036, or by fax delivery to (202) 386-7190. For the quickest possible handling of a mail request, you should mark both your request letter and the envelope "Freedom of Information Act Request." (You may find the agency's "Freedom of Information Act Reference Guide" -- which is available in electronic format on its website and in paper form -- helpful in making your request.) If you are making a request for records about yourself, see § 304.21(d) for additional requirements. If you are making a request for records about another individual, then either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary notice) will help the processing of your request. Your request will be considered received as of the date upon which it is logged in as received by the agency's FOIA Public Liaison.

(b) *Description of records sought.* (1) You must describe the records that you seek in enough detail to enable agency personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, you should include any file designations or similar descriptions for the records that you want. As a general rule, the more specific you are about the records or type of records that you want, the more likely that the agency will be able to locate those records in response to your request. Before submitting your request, you may contact the agency's FOIA Public Liaison at (202) 480-2080 for assistance in describing the records.

(2) If the agency determines that your request does not reasonably describe records, then it will tell you either what additional information is needed or why your request is otherwise insufficient. It also will give you an opportunity to discuss your request by telephone so that you may modify it to meet the requirements of this section. Additionally, if your request does not reasonably describe the records you seek, the agency's response to it may be delayed as an initial matter.

(c) *Format of records sought.* Requests may specify the preferred form or format (including electronic formats) for the records you seek. The agency will accommodate your request if the record is readily reproducible in that form or format.

(d) *Agreement to pay fees.* When you make a FOIA request, it will be considered to be an agreement by you to pay all applicable fees charged under § 304.9, up to \$50.00, unless you specifically request a waiver of fees. The agency ordinarily will confirm this agreement in an acknowledgment letter. When making a request, you may specify a willingness to pay a greater

or lesser amount. Your agreement will not prejudice your ability to seek a waiver or reduction of any applicable fee at a later time.

5. Amend § 304.5 by revising paragraphs (b) and (c)(1) to read as follows:

**§ 304.5 Timing of responses to requests.**

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(b) *Multi-track processing.* The agency generally uses two processing tracks that distinguish between simple and complex requests. In determining the appropriate track for a request, the agency considers, among other factors, the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. When a request is placed on the complex track, the agency will provide the requester with an opportunity to narrow or modify the request so that it can be placed on the simple track. The agency will contact the requester by telephone, e-mail or letter, whichever is most efficient, in each case.

(c) *Unusual circumstances.* (1) Where the statutory time limit of 20 days for processing a request cannot be met because of “unusual circumstances,” as defined in the FOIA, and the agency extends the time limits on that basis, it will, before expiration of the 20-day period, notify the requester in writing of the unusual circumstances and of the date by which the agency estimates processing of the request can be expected to be completed. Where the extension is likely to exceed ten working days, the agency will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. In such instances, the agency’s FOIA Public Liaison will contact the requester, and the requester will be informed of the mediation services offered by the Office of Government Information Services (“OGIS”) — see <https://www.archives.gov/ogis>.

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6. Revise § 304.6 to read as follows:

**§ 304.6 Responses to requests.**

(a) *Acknowledgments of requests.* On receipt of a request, if the agency cannot provide the requested information within two working days, then an acknowledgment letter or e-mail message will be sent to the requester that will confirm the requester's agreement to pay fees under § 304.3(d) and will provide a request tracking number for further reference. Requesters may use this tracking number to determine the status of their request – including the date of its receipt and the estimated date on which action on it will be completed – by calling the agency's FOIA Public Liaison at (202) 480-2080. In some cases, the agency may seek further information or clarification from the requester.

(b) *Grants of requests.* Ordinarily, the agency will have 20 working days from when a request is received to determine whether to grant or deny the request. Once the agency makes such a determination, it will immediately notify the requester in writing. The agency will inform the requester in the notice of any fee charged under § 304.9 and will disclose records to the requester promptly upon payment of any applicable fee. The agency will also inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(c) *Adverse determinations of requests.* Whenever the agency makes an adverse determination denying a request in any respect, it will notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the

form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited treatment. The denial letter will include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemption(s) applied by the agency in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) An indication on the released portion of a record of each exemption applied, at the place at which it was applied, if technically feasible.

(5) A statement that the denial may be appealed under § 304.8(a) and a description of the requirements of § 304.8(a).

(6) A statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS.

(d) *Markings on released documents.* Records disclosed in part will be marked or annotated to show the amount of information deleted, unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also will be indicated on the record, if technically feasible.

7. Revise § 304.8 to read as follows:

### **§ 304.8 Appeals.**

(a) *Appeals of adverse determinations.* If you are dissatisfied with the response to your request, you may appeal an adverse determination denying your request, in any respect, to the Chairman of the agency. You must make your appeal in writing, by e-mail or letter, and it must be received by the agency within 90 calendar days of the date of the agency's response denying your request. Your appeal should provide reasons and supporting information as to why the initial determination was incorrect. The appeal should clearly identify the particular determination (including the assigned request number, if known) that you are appealing. For the quickest possible handling of a mail request, you should mark your appeal "Freedom of Information Act Appeal." The Chairman or his or her designee will act on the appeal, except that an appeal ordinarily will not be acted on if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The decision on your appeal will be communicated to you by e-mail or letter, ordinarily within 20 working days of receipt of your appeal. A decision affirming an adverse determination in whole or in part will contain a statement of the reason(s) for the affirmance, including any FOIA exemption(s) applied, and will inform you of the FOIA provisions for court review of the decision. The decision will also inform you of the mediation services offered by OGIS as a non-exclusive alternative to FOIA litigation. If the adverse determination is reversed or modified on appeal, in whole or in part, then you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision.

(c) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the agency agrees to participate in the mediation services provided by OGIS, it will actively engage in the process in an attempt to resolve the dispute.

(d) *When appeal is required.* As a general rule, if you wish to seek review by a court of any adverse determination, you must first appeal it in a timely fashion under this section.

8. Amend § 304.9 by revising paragraphs (a), (d)(6), (e), (i)(3), and (k) to read as follows:

**§ 304.9 Fees.**

(a) *In general.* The agency will charge for processing requests under the FOIA in accordance with paragraph (c) of this section and with the OMB Guidelines. The agency ordinarily will collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

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(d) \* \* \*

(6) (i) If the agency fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in (d)(6)(ii)-(iv).

(ii) If the agency has determined that unusual circumstances as defined by the FOIA apply and the agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit will be excused for an additional 10 working days.

(iii) If the agency has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The agency must have provided timely written

notice of unusual circumstances to the requester in accordance with the FOIA and the agency must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the agency may charge all applicable fees incurred in the processing of this request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits will be excused for the length of time provided by the court order.

(e) *Notice of anticipated fees in excess of \$50.00.* (1) When the agency determines or estimates that the fees to be charged under this section will amount to more than \$50.00, it will notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the agency will advise the requester that the estimated fee might be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than \$50.00, the request will not be considered received and further work will not be done on it until the requester agrees to pay the total anticipated fee. Any such agreement should be memorialized in writing. A notice under this paragraph will offer the requester an opportunity to discuss the matter with agency personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(2) If the requester has indicated a willingness to pay some designated amount of fees, but the agency estimates that the total fee will exceed that amount, the agency will suspend the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The agency will inquire whether the

requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(3) The agency will make its FOIA Public Liaison available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

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(i) \* \* \*

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the agency within 30 calendar days of the date of billing, the agency may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before it begins to process a new request or continues to process a pending request from that requester.

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(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The agency will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the requested records must concern identifiable

operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to convey information effectively to the public will be considered. The agency will presume that a representative of the news media satisfies this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the agency will consider the following criteria:

(A) Whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(B) Whether any identified commercial interest is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i)

and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The agency ordinarily will presume that when a news media requester has satisfied factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed primarily to serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records.

(4) Requests for a waiver or reduction of fees should ordinarily be made when the request is first submitted to the agency and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

9. Amend § 304.10 by revising paragraph (a) to read as follows:

**§ 304.10 Preservation of records.**

(a) The agency will preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

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DATED: January 11, 2017

**David M. Pritzker,**

*Deputy General Counsel.*

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